W.S.C. & ANOR. v. COMPTROLLER-GENERAL OF INLAND REVENUE

[A.C.J. (Hashim Yeop A. Sani J.) December 11, 1974]
[Kuala Lumpur — Originating Motion No. 12 of 1972]

Income Tax — Appeal — Assessment by Comptroller — Onus of proving that assessment is excessive — Whether moneys received by appellant gifts from son or profits from business — Inferences from primary facts — Income Tax Ordinance, 1947, s. 76(3).

The original appellant had been assessed to tax on certain moneys received by him from Indonesia. He claimed that the moneys were capital receipts as they were gifts from his son in Indonesia. The Comptroller-General contended that they were profits from appellant's business in Indonesia. On appeal to the Special Commissioners it was held that the moneys represented profits from the appellant's business in Indonesia and were therefore liable to tax. The appellant having since died, the appeal was brought by the personal representatives by way of case stated to the High Court.

Held: (1) the apparent mis-statement or misconception of the law relating to gifts in the grounds of decision of the Special Commissioners did not form part of their decision and did not bear upon the determination arrived at by them;

(2) the inference or conclusion drawn by the Special Commissioners was the only reasonable inference or conclusion which could have been drawn under the circumstances and therefore the appeal must be dismissed.

Cases referred to:-

(1) *Hudson* v. *Humbles (H.M. Inspector of Taxes)* 42 T.C. 380.
(2) *Moschi* v. *Kelly* 33 T.C. 442.
(3) *T. Haythornthwaite and Sons Ltd.* v. *Kelly* 11 T.C. 657.
(4) *Edwards* v. *Bairstow* (1956) A.C. 14.
(5) *Gurcharan Kaur* v. *Rochi Silk Store* [1959] M.L.J. 229, 231.
(6) *Moschi* v. *Commissioners of Inland Revenue* 33 T.C. 446.
(7) *Smithwick* v. *National Coal Board* [1950] 2 K.B. 335.

CASE STATED.

R. R. Chelliah (*Kam Woon Wah* with him) for the appellants.

Mohamed bin Mohamed Said (Federal Counsel) for the respondent.

Hashim Yeop A. Sani J.: This is an appeal by way of case stated pursuant to paragraph 34 of Schedule 5 to the Income Tax Act, 1967. The original appellant, one L.J.S., has since died and the appeal is prosecuted by W.S.C. and W. S. T. the administratrix and administrator respectively of the estate of the deceased who for convenience will be referred to in this judgment as the "appellant".

The appeal is against the decision of the Special Commissioners of Income Tax in respect of Additional Assessments for the Years of Assessment 1960-1964 inclusive. The background to these additional assessments is as follows. Some time in early 1966 the respondent caused an investigation into the taxation affairs of the appellant. On 20 April 1966 the Income Tax Department handed him Form IT. 103 requiring him to disclose a full and complete statement of his assets and liabilities as at 31st December of each year from 1958 to 1965 inclusive. The appellant's tax agents (a firm of public accountants) submitted to the Department a statement of his assets (without his liabilities) — Exhibit R3. The Department followed up with a lengthy letter dated 11th October, 1966 — Exhibit R12. Some of the Department's queries were not replied by the appellant. Subsequently the Department gave the appellant Form I.T. 102 for completion but he did not return the form to the Department. Eventually on 13 August 1968 the Department sent appellant a letter dated 13th August, 1968 (Exhibit R4) and notices of additional assessments for the years of assessment 1960 to 1964 both years inclusive — Exhibits A1, A2, A3, A4 and A5 in Agreed Bundle A1. On 15 October 1968, another firm of public accountants on behalf of the appellant lodged notice of objection to these additional assessments — Exhibit R7. The Department's reply is in letter dated 26th October, 1968 marked Exhibit R5; and Exhibit R6 attached to Exhibit R5 disclosed the alleged understatements of the appellant's income for the years of assessment 1960-1965 inclusive. These alleged understated incomes were included in the respective additional assessments. The appellant appealed.

At the hearing of the appeal the appellant submitted a revised statement of his assets and liabilities for the years 1958 to 1963 inclusive. After an adjournment the Department submitted a revised capital statement of the appellant (Exhibit R33) and the alleged understatements of the appellant's income for the years of assessment 1960 to 1964 were revised accordingly. Appellant conceded to the revised capital statement with few exceptions. Finally both parties agreed to the following figures: —

Year of Assessment 1960 — alleged understated income	$ 51,047	
alleged tax underpaid		$ 14,855.65
Year of Assessment 1961 — alleged understated income	51,013	
alleged tax underpaid		14,510.35
Year of Assessment 1962 — alleged understated income	139,176	
alleged tax underpaid		56,850.37
Year of Assessment 1963 — alleged understated income	91,997	
alleged tax underpaid		40,131.00
Year of Assessment 1964 — alleged understated income	440,254	
alleged tax underpaid		197,912.44
Total alleged understated income =	$773,487	
Total alleged tax underpaid =		$324,259.81

At the outset the following must be noted in this appeal. Firstly, the method used in computing the income of a taxpayer by way of capital statement as basis of assessment has been judicially approved — see *Hudson* v. *Humbles (H.M. Inspector of Taxes)*[1] and *Moschi* v. *Kelly*.[2] Secondly, before the Commissioners as well as before this court, appellant admitted the capital statement contained in R33 as amended by paragraph 3(a) of the Deciding Order at page 20 of the Case stated. Therefore, in the words of counsel for appellant, the dispute is only as to the nature of the money that makes the difference. The appellant says they were capital since he contends that he received them as gifts from his son in Indonesia. The respondent says they were profits from appellant's businesses in Indonesia. Thirdly, before the Commissioners the onus was on the appellant to show that these capital increases were derived from non-taxable source or

sources. In *T. Haythornthwaite and Sons Ltd.* v. *Kelly*[3] a case stated under the Income Tax Act 1918 of U.K. Lord Hanworth M.R. at page 667 stated as follows: —

"Now it is to be remembered that under the law as it stands the duty of the Commissioners who hear the appeal is this: Parties are entitled to produce any lawful evidence, and if on appeal it appears to the majority of the Commissioners by examination of the appellant on oath or affirmation, or by other lawful evidence, that the appellant is over-charged by any assessment, the Commissioners shall abate or reduce the assessment accordingly; but otherwise every such assessment or surcharge shall stand good. Hence it is quite plain that the Commissioners are to hold the assessment standing good unless the subject — the appellant — establishes before the Commissioners, by evidence satisfactory to them, that the assessment ought to be reduced or set aside."

This onus is also expressly set out in section 76(3) of our Income Tax Ordinance, 1947 which applies in this case. That section provides that: —

"(3) The onus of proving that the assessment is excessive shall be on the appellant."

Having thus disposed of the preliminaries I would like to go into the facts as found by the Commissioners. Very briefly they are as follows.

The appellant was born in China but migrated to Indonesia more than thirty years ago and lived there until 1958. He left Indonesia because he felt that the Government policy was against the Chinese and he was not an Indonesian citizen. When he left Indonesia for Malaysia he left his wife and eldest son in Jakarta. His eldest son, L.T.F., is an Indonesian subject. While in Indonesia appellant set up two businesses, one dealing in building materials and hardware and the other was a paint factory. His first business started in 1951 when the appellant obtained a written authorisation from the Indonesian authority and he carried on this business until 1955 when the said written authorisation was handed to his eldest son. This written authorization and transfer can be seen in Document A11 of Exhibit A1. At the time of the appeal before the Commissioners this business was carried on by the eldest son of the appellant jointly with his wife, and two other Indonesians not related to either of them. The other business, a paint factory, was set up in 1953. The appellant carried on this business until 1958 when he handed it to his eldest son and this transfer was also recorded in Document A12 of Exhibit A1. At the time of the appeal before the Commissioners they were unable due to lack of evidence to ascertain the true value of either the first business or the second business at the time the written authorizations were transferred to the name of the eldest son of the appellant.

On 27 March 1953 Document A13 of Exhibit A1 states that the appellant also bought land in Jakarta with a house thereon. In 1964 the eldest son exercised the power of attorney granted him by the appellant and sold this property for two million rupiahs.

The Commissioners also found that the appellant when he left Indonesia for Singapore in January 1958 did not take with him any money or travellers cheque. Before he arrived in Malaysia the appellant did not own any asset or property in this country. There is no doubt that the appellant had exceptional business calibre for the Commissioners also found that soon after arriving in Malaysia he started a paint industry which was issued with pioneer certificate in 1959. Soon thereafter the appellant began to have interests in a number of businesses both in Kuala Lumpur and Singapore.

During the material period the appellant received various sums of money from his eldest son in Indonesia. These moneys were sent through the black market and as such documents relating to those transactions were destroyed. The mode of operation found by the Commissioners and not disputed by the appellant was that the eldest son used for these transactions certain business people who had interests both in Indonesia and Singapore. These people are Lim Teck Lee & Co. Ltd. (paragraph 6 of Annexure B), Chia Hui Ming and Tat Lee Co. Ltd., Singapore (paragraph 13 of Annexure B) and also others with similar positions.

In 1958 the appellant executed a power of attorney in favour of the eldest son and in 1959 or 1960 the eldest son reciprocated by executing a power of attorney in favour of the appellant. The good relationship between father and son deteriorated in 1965 when the appellant got himself another wife. The Commissioners found and it was not disputed by the appellant that until then there was no clear distinction between the appellant and the eldest son as to which sum of money belonged to the appellant and which to the eldest son. It was only in or about 1968 that each revoked the power of attorney granted to the other. In respect of his incomes derived from all his business activities in Malaysia the appellant had paid in full all taxes due from him.

Besides the above it was also found by the Commissioners and admitted by the eldest son that those remittances by the son to the appellant were profits from the said businesses in Indonesia.

The grounds of decision of the Commissioners came under heavy attack by the appellant's counsel. I would summarise the attack into the following: —

(1) The grounds of decision of the Commissioners contained *ex facie* statements which are bad law and therefore it is quite apparent that the Commissioners were acting under a misconception of the law and that this misconception had been responsible for their decision;

(2) The primary facts which the Commissioners had accepted do not justify the inference or conclusion which the Commissioners have drawn;

(3) Undue weight was given to the appellant's failure or refusal to disclose the power of attorney granted to the eldest son.

The challenge by the appellant of the decision of the Commissioners clearly invokes the tests set out by Lord Radcliffe in the celebrated case *Edwards* v. *Bairstow*.[4] The relevant passage from the speech of Lord Radcliffe was quoted with approval in *Gurcharan Kaur* v. *Rochi Silk Store*.[5] The passage appears at page 36 as follows: —

"If the case contains anything *ex facie* which is bad law and which bears upon the determination, it is. obviously, erroneous in point of law. But, without any such misconception appearing *ex facie*, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test."

Counsel for the appellant particularly attacked paragraph 4 of the grounds of decision of the Commissioners on the grounds that the paragraph contains *ex facie* misstatement of the law. For example, gifts need not have consideration. But in my view that paragraph must be related back to the facts as found by the Commissioners. The facts are that the two authorizations for carrying on the businesses were transferred to the name of the eldest son but the Commissioners were unable to ascertain the true values of the businesses at the time of the transfers. The power of attorney granted by the appellant to the son was not disclosed. There was evidence that the other property of the appellant was sold by the son in exercise of the power of attorney. Looking at the facts as found by the Commissioners and their grounds of decision I hold that the apparent misstatement of the law in paragraph 4 did not form the basis of their decision and therefore the apparent misstatement of the law did not bear upon the determination arrived at by the Commissioners. The Commissioners after considering all the evidence before them concluded that the appellant continued to have beneficial interests in the two businesses. The fact that it was also admitted by the eldest son that there was no clear distinction between them as to which money belonged to either of them during the material period until 1968 (when the relationship between them turned sour) only goes to show that the inference drawn by the Commissioners from the primary facts is not an unreasonable one. Lord Radcliffe in *Edwards* v. *Bairstow, supra,* said at page 21: —

"One should approach the finding of the commissioners by distinguishing between the primary facts found and the conclusions drawn from those facts. In cases under the Income Tax Act all the facts are before the court, which is entitled to form its own opinion. Looking at the conclusion reached by the commissioners on the stated facts, the court may find that their conclusion is such that no reasonable person could have reached it. Then the conclusion can be reversed. But if on a consideration of the facts stated a reasonable man can choose one of two conclusions, that is a middle field in which the commissioners are masters: see *Bracegirdle* v. *Oxley*."

A case which was quite similar to this in certain aspects was *Moschi* v. *Commissioners of Inland Revenue*.[6] In that case the Inspector of Taxes being dissatisfied with M's Income Tax returns and his business accounts caused estimated Income Tax and Excess Profits Tax assessments to be made on him for the relevant years. Various explanations were put forward from time to time by Mr. M. The first was that he had brought £2,300 in foreign currency when he arrived in 1933. Then he said that he had brought another £10,000 in foreign currency in about 1943 and changed it through a bank in London but the bank whose records were consulted did not confirm the story. Then he said that he had brought something like £20,000 worth of diamonds but admitted that he declared no diamonds to the Customs authorities and paid no duty. The Commissioners who heard the appeal, not being impressed with Mr. M's story, drew the inference that the source of the appellant's otherwise unexplained wealth was business profits which he had not declared. Somervell L.J., at page 450, said in his judgment: —

"... It seems to me, looking at the matter broadly, as it was before the Commissioners, they were fully entitled to say that the taxpayer had not discharged the onus which lay upon him of establishing his contention that this money came from assets brought in from 1933."

Finally, having regard to the facts as found by the Commissioners, was the inference drawn by the Commissioners represented a mere guess or was it an inference which reasonable persons could draw? See also judgment of Denning L.J. (as he then was) in *Smithwick* v. *National Coal Board*.[7]

It is clear that under the circumstances the inference which the Commissioners drew from the facts before them did not represent a mere guess but was an inference which reasonable persons could draw. In fact an inference that the remittances were gifts would in my view be illogical because further like remittances of amounts ad infinitum would also have to be construed as gifts because the actual values of the two businesses transferred to the son were never made known to the Commissioners.

Therefore my answer to the challenge by the appellant of the grounds of decision of the Commissioners referred to earlier would simply be as follows: —

(1) The apparent misstatement or misconception of the law did not form the basis of their decision and did not bear upon the determination arrived at by the Commissioners;

(2) The inference or conclusion drawn by the Commissioners was the only reasonable inference or conclusion which could have been drawn under the circumstances;

(3) Under the circumstances having regard to the facts before the Commissioners and the onus on the appellant they were entitled to infer that the power of attorney if produced would have been against the appellant.

For the above reasons the appeal is dismissed with costs. The deciding order of the Commissioners is hereby confirmed.

Appeal dismissed.

Solicitors: *Kam Woon Wah & Co.*